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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Improving accountability and access to remedy for victims of business-related human rights abuse through State-based non-judicial mechanisms

Report of the United Nations High Commissioner for Human Rights

Summary

The present report sets out recommended action to improve accountability and access to remedy for victims of business-related human rights abuses through State-based non-judicial mechanisms. It has been compiled as part of the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR), pursuant to the request of the Human Rights Council in its resolution 32/10. It follows up on the report on accountability and access to remedy through judicial mechanisms prepared during the first phase of the Project (see A/HRC/32/19 and Add.1).

In the report, the High Commissioner explains the scope of the work involved and the approach taken by OHCHR, and makes general observations about the role of State-based non-judicial mechanisms in achieving accountability and access to remedy in business and human rights cases. The report includes an annex containing a set of recommended "policy objectives" for States, supported by a series of elements intended to demonstrate the different ways that States can work towards meeting those objectives. Additional explanations, drawn from the two-year research process undertaken by OHCHR, are contained in an addendum to the report (A/HRC/38/20/Add.1).

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I. Introduction

1. In 2013, as part of its mandate to advance the protection and promotion of human rights globally, the Office of the United Nations High Commissioner for Human Rights (OHCHR) initiated a process aimed at helping States strengthen their implementation of the pillar on access to remedy of the Guiding Principles on Business and Human Rights (see A/HRC/17/31, annex).

2. In its resolution 26/22, the Human Rights Council requested the High Commissioner to continue work on improving access to remedy and to report thereon to the Council. In November 2014, and pursuant to that mandate, OHCHR launched the Accountability and Remedy Project, which explored the role and use of judicial mechanisms (namely, domestic courts). The High Commissioner submitted a report thereon to the Council at its thirty-second session (A/HRC/32/19 and Add.1).

3. In its resolution 32/10, the Human Rights Council requested the High Commissioner to identify and analyse lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context. The work carried out by OHCHR pursuant to that request comprises part II of the Accountability and Remedy Project, which is the subject of the present report (see also A/HRC/38/20/Add.1).

II. Accountability and access to remedy: the role of State-based non-judicial mechanisms

4. Victims of business-related human rights abuses continue to struggle to achieve effective remedies for the harm they have suffered. While challenges vary from one context to another, a number of persistent problems common to many jurisdictions may be identified: fragmented, poorly designed or incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; problems in gaining access to sufficient funding for private law claims; and a lack of enforcement (A/HRC/32/19, para. 4).

5. Ensuring the accountability of business enterprises and access to effective remedy for victims is a vital part of a State's duty to protect against business-related human rights abuses, as required by international human rights law and reflected in the Guiding Principles. While effective judicial mechanisms are at the core of ensuring access to remedy (see A/HRC/17/31, annex, principle 26 and commentary), administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms (ibid., principle 27 and commentary).

6. State-based non-judicial mechanisms may take many different forms. In most jurisdictions, a range of mechanisms with a role to play in the handling of complaints and/or resolving disputes arising from business-related human rights abuses may be identified. Such mechanisms can be found at all levels of government: local, regional and national. While some have mandates relating to all human rights, many are specialized bodies that focus on specific human rights-related themes, such as labour rights, non-discrimination, consumer rights, the right to privacy, environmental rights, or the rights to water or to health. Common examples of relevant State-based non-judicial mechanisms include labour inspectorates; employment tribunals; consumer protection bodies (often tailored to different business sectors); environmental tribunals; privacy and data protection bodies; State ombudsman services; public health and safety bodies; professional standards bodies; and national human rights institutions.

7. In addition to the above-mentioned categories, States may innovate further to respond to specific business-related human rights risks within their jurisdictions, and in some cases have done so by establishing specialized mechanisms aimed at the protection of groups identified as being at a heightened risk of vulnerability or marginalization, such as

women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

8. State-based non-judicial mechanisms also vary in their originating regimes and sources of authority. While many have their mandates, functions and powers defined by statute, some are the consequence of regulations or administrative orders, while others are on a more informal footing. Some — such as complaint mechanisms relating to professional standards — exist by virtue of specific regulatory regimes. Others, such as national contact points under the Guidelines on Multinational Enterprises of the Organization for Economic Cooperation and Development, are part of implementing arrangements under an international instrument and/or initiative.

9. These mechanisms are also diverse in their functions and powers; for instance, some are regulatory and/or adjudicative-type mechanisms, while others provide conciliation and/or mediation services. Some have self-executing powers (for example, to compel participation, to require production of information or to enforce remedial outcomes), whereas others rely on the cooperation of the parties involved. Some have the authority to conduct investigations on their own initiative, while the procedures followed by others can only be activated by specific complaints or disputes.

10. State-based non-judicial mechanisms can be broken down into five broad categories:

- Complaint mechanisms[1]
- Inspectorates[2]
- Ombudsman services[3]
- Mediation or conciliation bodies[4]
- Arbitration and specialized tribunals[5]

11. The diversity and widespread use of these mechanisms highlight both their importance in regulatory terms and their adaptability to different contexts and challenges. The experiences of those seeking accountability and remedy for business-related human rights abuses suggest, however, that in many cases these mechanisms are not yet fulfilling the role envisaged for them in the Guiding Principles (see A/HRC/17/31, principle 27 and commentary). Haphazard legal and institutional development in some jurisdictions has led to unevenness and gaps in the extent to which different human rights are protected through these mechanisms. Complaints about underresourcing and lack of technical capacity are common. Rights holders' lack of awareness of their rights, and the lack of accessibility of mechanisms (particularly by people at a heightened risk of vulnerability and/or marginalization) are problems in many jurisdictions. In serious or complex cases, it can be difficult to identify a mechanism (or combination of mechanisms) with a sufficiently broad

[1] Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities.

[2] Typically operated by a State-appointed, State-supported and/or State-approved body with public regulatory and enforcement responsibilities and a range of enforcement functions and powers, including powers of investigation and to prescribe penalties and/or remedial action. Such a mechanism may take action on its own initiative or in response to a complaint, or both. It may also have education and awareness-raising functions.

[3] Typically with a specialized mandate associated with specific interest groups, regulatory themes or commercial sectors. Such mechanisms are charged with receiving, investigating and resolving disputes between individuals and business enterprises, and frequently draw on mediation and/or conciliation techniques to do so.

[4] Similar to ombudsman services, and aimed at finding a mutually acceptable outcome rather than the apportionment of blame. Mediation and conciliation techniques are often used in the resolution of consumer, employment or environment disputes and may be the precursor to more formal processes (for example, arbitration and conciliation).

[5] Oversee dispute resolution processes that are adversarial and/or inquisitorial in nature. Such mechanisms often have a high degree of procedural formality. Some have investigative powers that can be used on their own initiative. They may have the power to make legally binding determinations.

mandate to address the case in its entirety; responses can therefore be fragmented, and remedial outcomes may not meet international standards (see annex, para. 4.1). Lastly, owing to the strictly territorial mandate of many State-based non-judicial mechanisms, they often have limited, if any, authority to respond to cross-border cases.

12. There is scope for significant improvement in the capacity of State-based non-judicial mechanisms, working individually and in combination, to deliver effective remedies in cases where human rights have been adversely affected by business activities. As a first step, there is a need for a greater understanding of the importance of State-based non-judicial mechanisms to the fulfilment by each State of its duty to protect against business-related human rights abuses and the contribution of each of these as part of a comprehensive State-based accountability and remedy system. Improving the effectiveness of these mechanisms and ensuring that they can fulfil the functions assigned to them within these systems (including the vital role of complementing and supporting judicial mechanisms) will require concerted and multifaceted efforts from all States, unilaterally and in cooperation.

III. Overview

A. Scope

13. Part II of the Accountability and Remedy Project has the aim of clarifying ways that States can strengthen their implementation of the pillar on access to remedy of the Guiding Principles through State-based non-judicial mechanisms, focusing in particular on (a) the structure and mandate of different mechanisms; (b) investigations and information-gathering processes; (c) aspects of the "effectiveness criteria" for non-judicial mechanisms (see A/HRC/17/31, principle 27 and commentary); (d) systemic effectiveness and policy coherence; and (e) cross-border cooperation.[6]

14. Many States face wider political, social and economic challenges that may undermine the effectiveness of State-based non-judicial mechanisms, including with regard to respect for the rule of law, poverty, corruption, and lack of resources and capacity of key institutions. The recommended action (see annex) is intended to complement and support the vital action by States to address these wider challenges.

B. Methodology

15. To better understand the challenges relating to State-based non-judicial mechanisms at the national level, and the actions likely to be most effective given the diversity of legal systems, structures and traditions around the world, OHCHR gathered empirical information from a wide range of jurisdictions, by reviewing more than 430 business and human rights-related events, news reports, allegations and disputes; conducting a detailed information-gathering process (comprising a global online consultation and a directed process involving scholars and practitioners from a wide range of jurisdictions); performing additional work focusing specifically on the role and activities of national contact points under the OECD Guidelines and national human rights institutions; participating in a webinar to gather business views; holding two multi-stakeholder consultations; and conducting regular online consultative processes at key points in the project.[7] All key

[6] The project parameters proposed by OHCHR were reviewed at a two-day expert workshop held in Geneva on 19 and 20 January 2017. The workshop was attended by representatives of States, civil society, businesses, United Nations agencies and international organizations, and academics with expertise in the field of State-based non-judicial mechanisms (see https://business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf). For the final list of focus areas and research processes, see https://business-humanrights.org/sites/default/files/documents/ARPII_phase1_Sector%20Study_Part%201.pdf.

[7] See OHCHR, "Accountability and Remedy Project Part II: State-based non-judicial mechanisms: State-based non-judicial mechanisms for accountability and remedy for business-related human

documents and milestones of the project were communicated directly to States and made available to other stakeholders through relevant platforms and information-sharing channels.[8] In addition, a meeting to gather feedback directly from representatives of States and State-based non-judicial mechanisms was held in Geneva on 22 and 23 February 2018.

C. Structure and approach of the recommendations

16. The recommended action comprises a number of policy objectives and elements to demonstrate the different ways that policy objectives can be achieved (see annex). This structure, based on an approach similar to that used for the final report on part I of the Accountability and Remedy Project (A/HRC/32/19 and Add.1), is deliberately flexible. To ensure global relevance and applicability, the recommended action is designed to be readily adaptable to different legal systems and contexts while also practical, forward-looking and reflective of international standards on access to remedy.

17. The recommended action should not be regarded as a finite list of possible solutions. There may indeed be other ways of achieving the underlying goal of improving implementation by States of the Guiding Principles in general and the effectiveness criteria for non-judicial grievance mechanisms (see A/HRC/17/31, principle 31 and commentary) in particular. Nor should it be read as an exhaustive list of the actions to be taken by States to implement the pillar on access to remedy of the Guiding Principles.

18. Nevertheless, the recommended action will be a significant resource for States seeking to improve the effectiveness of their non-judicial mechanisms with respect to business and human rights challenges, as well as constituting a possible platform for future dialogue, cross-fertilization of ideas, innovation and progress.

D. Target audience

19. The recommended action is addressed primarily to States and State agencies concerned with the design, development, administration and oversight of relevant State-based non-judicial mechanisms. States can implement these policy objectives in a variety of ways, for example, through a domestic review process, as part of national action plans on business and human rights, in strategies to improve access to justice or through other processes more suitable to the national context. The recommended action will also be relevant to policymakers and practitioners, including those involved in the management of State-based non-judicial mechanisms, law enforcement and national human rights institutions. The policy objectives may also help to inform the ongoing work of international bodies with mandates relevant to business and human rights, including human rights treaty bodies and the open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights. Various elements of the recommended action may be used to guide business enterprises and may be drawn upon by other stakeholders, such as civil society organizations and trade unions. Additional explanations of the different elements of recommended action (and suggested ways that they can be implemented) are contained in the addendum to the present report.

IV. General observations

20. The recommended action focuses on the steps that States can take to improve the effectiveness of State-based non-judicial mechanisms, at both the systemic and individual levels, in providing accountability and access to remedy in cases of business-related human rights abuses.

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rights: Supporting actors or lead players?", discussion paper prepared for the 6th UN Annual Forum on Business and Human Rights, Geneva, 27–29 November 2017, 2 November 2017.

[8] See www.ohchr.org/EN/Issues/Business/Pages/ARP_II.aspx.

A. Policy coherence and systemic effectiveness

21. In many (if not all) jurisdictions, the goals of improved accountability and access to remedy for business-related human rights abuses are often best served by providing affected individuals and communities with a range of options for seeking redress, which could involve judicial mechanisms, non-judicial mechanisms or, in some cases, a combination of them.

22. Part I of the recommended action addresses the challenges faced in achieving policy coherence between these diverse mechanisms, and the various ways in which States can work towards developing a legal and regulatory environment that enables these various mechanisms to make a positive collective contribution to accountability and remedy in business and human rights cases. It has been designed to help States (a) to identify the important interlinkages between the different bodies that make up a comprehensive State-based system to remedy business-related human rights abuse; and (b) to improve them where possible so that domestic laws and policies, taken as a whole, are able to provide affected individuals and communities with realistic and readily identifiable pathways to remedial outcomes that meet international standards with respect to the components of effective remedy, and make a positive contribution to future prevention.

B. Effectiveness of individual State-based non-judicial mechanisms

23. Part II of the recommended action concerns the effectiveness of individual State-based non-judicial mechanisms relevant to business respect for human rights. While different human rights-related risks and operating contexts will often require different regulatory and law enforcement responses, the elements of effectiveness of non-judicial mechanisms, and the steps needed to implement them effectively, are common to many different types of mechanisms. The recommended action in part II draws from the various information-gathering activities undertaken by OHCHR as part of the project, and highlights the different ways in which the various effectiveness criteria set out in Guiding Principle 31 can be implemented in practice.

C. State-based non-judicial mechanisms and cross-border cases

24. At present, relatively few State-based non-judicial mechanisms have the legal authority and capacity to respond to cross-border cases (see para. 15 above). In some jurisdictions, such mechanisms have been established to provide a means by which concerns about business-related human rights abuses in other jurisdictions can be raised and mediated, the national contact point system under the OECD Guidelines being a notable example. These mechanisms are, for the most part, mediation-type mechanisms with limited formal investigative powers of their own, and rely for their effectiveness on the cooperation of the business enterprises concerned. State-based non-judicial mechanisms that have strong enforcement powers and the ability to investigate allegations on their own initiative (namely, those mechanisms with specific regulatory mandates) tend to be limited to addressing within-territory harm.

25. Recent State practice, however, suggests a growing willingness by some State-based non-judicial mechanisms, and national human rights institutions in particular, to enter into ad hoc cooperative arrangements with counterparts in other States to investigate and identify ways of addressing the adverse effects of business-related activities on human rights that cross national boundaries.

26. Part III of the recommended action highlights the various ways in which the capacity of State-based non-judicial mechanisms respond to cross-border cases could be enhanced in practice.

V. Recommendations

27. **OHCHR recommends that Member States:**

(a) **As part of their implementation of the pillar on access to remedy of the Guiding Principles, consider undertaking a review of the scope and effectiveness of relevant State-based non-judicial mechanisms using the policy objectives and elements set out in the recommended action together with the model terms of reference (see A/HRC/38/20/Add.1) as a starting point;**

(b) **Develop a comprehensive strategy for the implementation of the policy objectives in a manner that responds appropriately to local legal structures, challenges and needs, for instance, as part of national action plans on business and human rights[9] and/or as part of strategies to improve access to justice in general;**

(c) **Take steps, using the policy objectives and elements set out in the recommended action as a starting point, to enhance the ability of State-based non-judicial mechanisms to respond to cases of business-related human rights abuses where the relevant facts, evidence, harm and/or actors are located in more than one jurisdiction, to the extent appropriate in the light of the mandates and functions of the mechanisms.**

[9] See Guidance on National Action Plans on Business and Human Rights, Working Group on Business and Human Rights, December 2014.

Annex

Recommended action to improve the effectiveness of State-based non-judicial mechanisms relevant to business and human rights

Part I. Improving the effectiveness of State-based non-judicial mechanisms within the context of the State's broader system of laws, policies and regulatory institutions

Policy objective 1: State-based non-judicial mechanisms, individually and in combination, contribute to the effective implementation of the State's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights abuses in a manner that is consistent with domestic legal structures and constitutional principles, and responsive to local needs and operating conditions, in particular the type, nature and severity of business-related human rights risks.

1.1 The State has conducted a comprehensive review process and consulted appropriately with stakeholders to determine (a) the range and types of State-based non-judicial mechanisms established in its jurisdiction that are relevant to respect by business enterprises of human rights; (b) whether their degree of independence, mandates, functions and powers are appropriate and sufficient, when analysed together with relevant laws and policies, to provide a legal and regulatory environment conducive to business respect for human rights; and (c) whether they meet the needs and sufficiently safeguard the rights of the individuals and/or communities for whom those mechanisms are intended.

1.2 The State has taken the steps necessary to correct any deficiencies identified with respect to the issues mentioned in paragraph 1.1 above.

1.3 Where relevant and appropriate, State-based non-judicial mechanisms are encouraged (and provided with the resources necessary) to engage and cooperate with other relevant State-based non-judicial mechanisms, law enforcement bodies and regulatory agencies for the purposes of improving the effectiveness of communication and coordination between the various mechanisms, bodies and agencies.

1.4 The State regularly reviews the effectiveness of the overall contribution of State-based non-judicial mechanisms to accountability and remedy for business-related human rights abuses, taking particularly into account matters such as (a) the extent to which there is policy coherence (see A/HRC/17/31, principle 8 and commentary) between the respective roles, policies and practices of relevant State-based non-judicial mechanisms and those of other relevant governmental departments, regulatory agencies and other State-based institutions; (b) areas where communication and coordination between different mechanisms, bodies and agencies could be improved in the light of their mandates and functions; (c) the degree of awareness and understanding of key personnel of State-based non-judicial mechanisms of the State's international legal obligations with regard to human rights and the role of such mechanisms in meeting those obligations; (d) whether these mechanisms meet the needs and sufficiently safeguard the rights of individuals and/or communities for whom they are intended; and (e) the recommendations of relevant oversight bodies, including peer review mechanisms. The State makes public the findings arising from such review processes and implements the necessary legal, policy and structural reforms and administrative improvements.

Policy objective 2: Individuals and communities affected by or at risk of business-related human rights abuses have a realistic and readily identifiable pathway to an effective remedy.

2.1 Information regarding the various complaint handling and/or dispute resolution options and mechanisms that may be available in different types of contexts and cases are made available to rights holders in a manner that is readily understandable by them.

2.2 Advisory and support services are made available to rights holders, which includes advice with regard to (a) the relative advantages and disadvantages of different complaint handling and/or dispute resolution options; and (b) the types of remedial outcomes that may be achieved through different mechanisms (including judicial ones).

2.3 The State encourages and provides the resources necessary to enable providers of the information and/or advisory and support services mentioned in 2.1 and 2.2 above to engage in appropriate physical outreach activities among relevant rights holders to promote the widest possible awareness of the various complaint handling and/or dispute resolution options and mechanisms that may be available in different contexts and cases, including through regional offices and service centres, mobile offices and "road shows".

2.4 Where the realization of an effective remedy is likely to require or benefit from the involvement of more than one State-based non-judicial mechanism, law enforcement body and/or regulatory agency, arrangements have been made to facilitate (as appropriate in the light of the mandates, functions and powers of the relevant agencies or mechanisms) the referral or exchange of information, proceedings and/or enquiries between the relevant agencies, bodies or mechanisms in a manner that is equitable, predictable, rights-compatible and transparent; consistent with domestic legal structures and constitutional principles; consistent with the objective of reducing barriers to remedy and not erecting barriers to prevent legitimate cases from being brought before rights holders' preferred mechanisms; takes into due account rights holders' needs and preferences with regard to access to different kinds of mechanisms; and also takes into due account the need for confidentiality in certain circumstances, and particularly with regard to the identity of individuals who may be at risk of threats, harassment or reprisals.

Policy objective 3: State-based non-judicial mechanisms and judicial mechanisms complement and support each other in a manner that promotes accountability and access to remedy for business-related human rights abuses.

3.1 There is delineation between the roles and responsibilities of State-based non-judicial mechanisms and judicial mechanisms. This delineation is appropriate to the type, nature and severity of different business-related human rights abuses, and recognizes that there will be cases where judicial recourse is an essential part of gaining access to remedy.

3.2 To the extent relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms can readily seek assistance from judicial mechanisms in relation to specific matters, such as the use of powers of investigation, in obtaining injunctive relief or in the enforcement of legally binding remedial outcomes.

3.3 Where relevant and appropriate in the light of their mandates and functions, State-based non-judicial mechanisms may (a) seek or recommend the transfer of complaints and/or disputes for adjudication by judicial mechanisms and/or (b) refer allegations or evidence of business involvement in human rights abuses to judicial mechanisms and/or other law enforcement bodies for investigation and/or further action. The procedures governing such transfers or referrals are equitable, predictable, rights-compatible and transparent, and take into due account rights holders' needs and preferences with respect to different complaint handling and/or dispute resolution options, and the need for confidentiality in certain circumstances, particularly with regard to the identity of individuals who may be at risk of threats, harassment and reprisals.

3.4 Rights holders are made aware of (a) the circumstances in which, and the procedural stages at which, judicial mechanisms may become involved in the investigation, adjudication and/or resolution of complaints and/or disputes that have been initiated in or referred to State-based non-judicial mechanisms; and (b) their rights to challenge and/or to

request a review of decisions by a State-based non-judicial mechanism with respect to the transfer or referral of proceedings, allegations or evidence to judicial mechanisms and/or other law enforcement bodies.

3.5 The procedural rules and practices of judicial mechanisms provide for the participation of State-based non-judicial mechanisms in judicial proceedings to the extent relevant and appropriate (for example, as prosecutors, advocates, representatives, expert witnesses or as persons authorized to intervene on the basis of having a specific interest or relevant expertise).

3.6 State-based non-judicial mechanisms and judicial mechanisms have adopted and implemented equitable, predictable, rights-compatible and transparent procedures to be followed in the event that more than one mechanism (whether judicial or non-judicial) has been called upon to investigate, adjudicate upon and/or mediate a set of allegations arising from a single event and/or similar sets of circumstances and involving the same business enterprises.

3.7 Rights holders retain the ability to alter a remedial course of action in response to evolving circumstances, including by transferring a complaint and/or dispute from a State-based mechanism to a judicial mechanism in the event that it becomes clear that judicial recourse is an essential part of having access to remedy and/or alternative methods of achieving effective remedy are unavailable.

3.8 In cases where both State-based non-judicial mechanisms and judicial mechanisms may have a role in the delivery of an effective remedy, their procedural rules and practices operate in a manner that serves to reduce barriers to remedy for rights holders and does not contribute to the creation of new barriers to remedy.

Policy objective 4: State-based non-judicial mechanisms, individually and in combination, contribute to the realization of effective remedial outcomes for individuals and communities that have been subjected to business-related human rights abuses.

4.1 The State adopts and implements laws and policies with respect to State-based mechanisms that are aligned with the principles of equal and effective access to justice, adequate, effective and prompt reparation for harm suffered, and access to relevant information concerning violations and reparation mechanisms.[1] To this end, laws and policies relevant to the realization of remedial outcomes in cases of business-related human rights abuses draw appropriately from all recognized categories of full and effective reparation (namely, restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition),[2] and wherever possible, provide for choice by rights holders of the type of remedial outcomes most appropriate in the light of the specific circumstances of the case.

4.2 The State has made appropriate arrangements to address the risk of non-implementation of remedial outcomes (including non-compliance with the terms of a remedial agreement or determination), which may include (depending upon the mandates and functions of the relevant mechanisms) (a) the use of robust self-executing enforcement powers; (b) the possibility of enforcement through judicial mechanisms; (c) regulatory or administrative follow-up activities (including monitoring); or (d) the imposition of regulatory and/or other consequences. Agencies responsible for enforcement, follow-up, monitoring or other action are appropriately responsive to requests by rights holders to exercise their powers of enforcement and/or supervision (as relevant), and operate in a manner consistent with international standards relating to the prompt implementation of remedial outcomes in cases of human rights abuse.

[1] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex).

[2] Ibid., sect. IX, para. 18.

Part II. Improving the effectiveness of individual State-based non-judicial mechanisms relevant to the respect by business enterprises for human rights

Policy objective 5: State-based non-judicial mechanisms are effective mechanisms for dealing with business-related human rights harm.

5.1 The State adopts and implements laws and/or policies with regard to the establishment and administration of State-based non-judicial mechanisms that are aligned with the effectiveness criteria set out in Guiding Principle 31.

5.2 State-based non-judicial mechanisms operate in a manner that is consistent with the recommendations of relevant oversight bodies, and take into due account the recommendations of other entities concerned with monitoring and evaluating their performance, such as peer review mechanisms.

Policy objective 6: State-based non-judicial mechanisms are legitimate.[3]

6.1 The State has made the structural, institutional, administrative and resourcing arrangements needed to (a) provide each State-based mechanism with a degree of operational autonomy from government functions that is appropriate in the light of its specific mandate and functions; (b) minimize the risk of conflicts of interest for the State-based mechanism (or any of its personnel) with respect to the discharge of its powers and/or functions; and (c) minimize the risk of any undue influence of any one actor or group of actors.

6.2 Where they are vested with powers to investigate allegations and/or complaints on their own initiative, State-based non-judicial mechanisms exercise such powers in an equitable, rights-compatible, predictable, transparent, timely and professional manner.

6.3 State-based non-judicial mechanisms have adopted and implemented appropriate procedures in the light of their mandates and functions to enable rights holders and other stakeholders to raise concerns or complaints about the manner in which such mechanisms have discharged specific functions or powers, such as the way they have responded to, investigated, adjudicated or resolved complaints and/or disputes.

6.4 The State has made appropriate arrangements to provide for the possibility to review a State-based non-judicial mechanism's decisions, actions or non-action in certain circumstances, such as where there is evidence of a possible conflict of interest, a procedural irregularity or other impropriety.

6.5 State-based non-judicial mechanisms are subject to periodic review by a suitable oversight body or peer review mechanism, which can offer advice as to how their performance and effectiveness might be improved.

6.6 State-based non-judicial mechanisms have adopted and implemented appropriate policies and procedures to detect, avoid and respond appropriately to conflicts of interest (both actual and potential), including those that may arise where the relevant mechanism has had conferred upon it a range of functions, such as education and awareness-raising, in addition to addressing complaints and resolving disputes.

Policy objective 7: State-based non-judicial mechanisms are accessible.[4]

7.1 State-based non-judicial mechanisms work proactively to raise awareness among rights holders of their mandates, functions and activities, including through targeted outreach activities.

7.2 The State takes such steps as are reasonable and appropriate in the light of the mandates and functions of the State-based non-judicial mechanism concerned to enable and

[3] A/HRC/17/31, principle 31 (a) and commentary.

[4] Ibid., principle 31 (b) and commentary.

to encourage to make complaint handling and/or dispute resolution services of the mechanism available to parties free of charge.

7.3 Where possible, financial assistance is made available to rights holders to help to defray the costs associated with assessing the relevant services. Proactive steps are taken to ensure that information about such financial assistance is conveyed to the rights holders for whom it is intended.

7.4 Complaint handling and/or dispute resolution processes are designed to be as user-friendly as possible and, where appropriate, allow for the possibility of (a) representation in person (namely, without the need for legal counsel); and/or (b) the assistance of a representative or other third party; and (c) collective redress.

7.5 State-based mechanisms take appropriate steps to enable rights holders to access and participate in complaint handling and/or dispute resolution processes in ways most convenient to them, including through online forms, telephone reporting, by post or in person.

7.6 State-based non-judicial mechanisms make available, free of charge, (a) advisory and support services necessary to promote easy access by individuals and communities to complaint handling and/or dispute resolution processes, including through online resources, such as downloadable pamphlets and videos, paper resources, and telephone helplines; and, (b) where relevant and appropriate, suitable advisory or "triage" services to ensure that complaints and/or disputes can be swiftly directed to the place where they can most quickly, efficiently and appropriately be resolved in the light of all relevant circumstances.

7.7 The materials, resources and advisory services referred to in paragraphs 7.5 and 7.6 above are made available (a) in formats that meet the needs and are consistent with the rights of persons with disabilities, including persons with impairments to hearing, sight or mobility; and (b) to an appropriate extent, in the light of the relevant mechanism's mandate and functions, in the languages of the rights holders for whom they are intended.

7.8 Periods of limitations, to the extent that they apply to the complaint handling and/or dispute resolution functions of State-based non-judicial mechanisms, are set in accordance with certain factors, such as the nature and severity of human rights risks addressed by the mechanism, and other issues, such as the remoteness of individuals and communities likely to be at risk and the particular needs of the rights holders for whom the mechanism is designed to help.

7.9 State-based non-judicial mechanisms have put in place measures designed to allow access to and use of the mechanisms by rights holders on an equal basis with others, for instance by improving physical and communicational accessibility to premises and by making adjustments to processes and procedures to facilitate their use (and reduce barriers to participation) by persons with disabilities, including deaf persons and persons with intellectual or psychosocial impairments, and older persons.

7.10 State-based non-judicial mechanisms adopt and implement procedures and practices to protect confidentiality where the context and circumstances of the case would make it necessary, particularly with respect to the identity of individuals who may be at risk of threats, harassment or reprisals, and appropriate safeguarding arrangements for the protection of rights holders, taking into account the particular needs of persons at greater risk of vulnerability and/or marginalization.

7.11 The confidentiality of the private information of users of State-based non-judicial mechanisms is protected by robust domestic law regimes on privacy and the protection of personal data.

7.12 The State adopts and enforces laws and takes other measures to protect individuals and communities from the risk of reprisals, harassment and discrimination as a consequence of having referred any business and human rights-related allegation, claim, complaint or dispute to a State-based non-judicial mechanism.

Policy objective 8: State based non-judicial mechanisms are predictable.[5]

8.1 In addition to the steps described in paragraph 7.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about the stages of relevant complaint handling and/or dispute resolution processes, including information about (a) any preliminary requirements that must be met; (b) what parties can expect at each stage, the time frames within which key decisions will be taken and milestones reached; (c) the rights of parties to withdraw from complaint handling and/or dispute resolution processes once commenced; (d) the legal consequences of remedial outcomes; (e) procedures for monitoring remedial outcomes of complaint handling and/or dispute resolution processes; and (f) the contents of any regulatory standards, codes of conduct or policies relating to any of the above.

8.2 To the extent relevant and appropriate in the light of their mandates and functions, permitted by applicable laws, standards and policies with respect to confidentiality and protection of whistle-blowers and individuals who may be at risk of threats, harassment or reprisals, and appropriate for the purposes of enhancing public understanding of complaint handling and/or dispute resolution processes and methodologies used in practice, State-based non-judicial mechanisms publish readily understandable information relating to past cases and/or determinations, such as case histories and/or aggregated information relating to the types of claims, complaints or disputes referred, the types of remedial outcomes and the time taken to achieve them.

Policy objective 9: State-based non-judicial mechanisms are equitable.[6]

9.1 In addition to the steps described in paragraphs 7.1 and 8.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders about sources of further information, advice and assistance available to enable them to participate fairly and effectively in the relevant processes.

9.2 State-based non-judicial mechanisms have adopted and implemented the procedures and practices necessary, in the light of their mandates and functions, to ensure that parties to a complaint and/or dispute receive (a) adequate and timely information concerning the arguments, allegations and evidence provided by the other party; (b) copies of or access to documentary or other evidence; (c) adequate opportunity to comment on each and all of the items mentioned in points (a) and (b) prior to any final decision or determination; (d) sufficiently detailed written reasons for decisions; and (e) readily understandable information concerning the steps to be taken, and the time limits that apply, should a party wish to seek review of or challenge a final decision or determination.

9.3 The procedural rules, policies and practices of State-based non-judicial mechanisms respect the rights of rights holders to withdraw from complaint handling and/or dispute resolution processes if they are dissatisfied with those processes and do not unfairly preclude access by rights holders to judicial recourse.

9.4 State-based non-judicial mechanisms have adopted and implemented policies, procedures and practices to ensure that its personnel disclose promptly any possible conflict of interest with respect to any complaint or dispute that they are asked to handle or resolve, and that following such a disclosure, the person concerned has no further involvement with the matter and is suitably replaced.

Policy objective 10: State-based non-judicial mechanisms are transparent.[7]

10.1 In addition to the steps described in paragraphs 7.1, 8.1 and 9.1 above, State-based non-judicial mechanisms work proactively to raise awareness among rights holders with respect to (a) procedural rules, policies, codes of conduct or standards that will govern complaint handling and/or dispute resolution processes, including liaison with parties and/or any investigation or fact-finding activities; (b) the adherence of the mechanism to

[5] Ibid., principle 31 (c) and commentary.
[6] Ibid., principle 31 (d) and commentary.
[7] Ibid., principle 31 (e) and commentary.

performance standards and the status of relevant certifications; and (c) other information likely to be important to rights holders, such as information about the average duration of complaint handling and/or dispute resolution processes and the likely costs in different scenarios.

10.2 State-based non-judicial mechanisms have put in place procedures to ensure that parties to a complaint and/or dispute are kept informed of key developments and requirements, including through online accounts, telephone helplines or dedicated case workers, as appropriate.

10.3 State-based non-judicial mechanisms publish and take proactive steps to disseminate periodic reports on their activities and performance that set out in a readily understandable format information likely to be useful to relevant rights holders, such as (a) the types of complaints and/or disputes referred to the mechanism in a given period; (b) the percentage of cases successfully resolved, and in what time period; (c) the percentage of cases rejected by the mechanism, and on what grounds; and (d) common challenges.

10.4 Information with respect to the activities and performance of State-based non-judicial mechanisms that are overseen by or operate within government departments is accessible to members of the public pursuant to domestic regimes on freedom of access to governmental information.

Policy objective 11: State-based non-judicial mechanisms are rights-compatible.[8]

11.1 The State adopts and implements laws and/or policies with regard to the administration of State-based non-judicial mechanisms that are consistent with the State's obligations under international human rights law, including the rights to equality of treatment and to non-discrimination.

11.2 State-based non-judicial mechanisms exercise their mandates and functions in a manner that promotes (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparation mechanisms.[9]

11.3 State-based non-judicial mechanisms have, with a view to achieving prompt, adequate and effective remedial outcomes for business-related human rights abuses, adopted and implemented procedures and practices designed to ensure, within the framework of and subject to their mandates and functions, that (a) complaints and/or disputes are addressed and concluded without undue delay; (b) in cases of severe or irremediable harm, the mechanism can take pre-emptive action to mitigate the harm; (c) rights holders are properly consulted with regard to the elements of an adequate and effective remedy in their specific case; (d) rights holders are properly consulted about and given an opportunity to comment on (and, where appropriate, provided with opportunities to take further or corrective action prior to) any decision by the mechanism to reject, defer, abandon or settle a complaint or dispute; and (e) following conclusion of a complaint handling and/or dispute resolution process, rights holders are provided with information regarding their options for further action, including on the steps that they should take in the event of non-compliance by a party with the terms of a remedial outcome of a non-judicial process.

11.4 In deciding whether to reject, defer, abandon or settle a complaint handling or dispute resolution process, State-based non-judicial mechanisms give due regard to the availability (or non-availability) of remedies under alternative mechanisms (including judicial mechanisms).

11.5 State-based non-judicial mechanisms take steps to ensure that members of their staff with responsibility for receiving and/or handling complaints and/or adjudicating and

[8] Ibid., principle 31 (f) and commentary.

[9] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, art. IX, para. 18.

resolving complaints and/or disputes arising from adverse human rights impacts that are business-related and/or providing advice or support to rights holders with respect to the same (a) are familiar with the needs and rights of the rights holders (whether individuals or groups) for whom the relevant mechanism is intended, with due consideration for the particular needs of individuals or groups at a greater risk of vulnerability and/or marginalization, and (b) have access to the human rights expertise needed to discharge their responsibilities in a non-discriminatory way and in a manner consistent with the international legal obligations and policy commitments of the State with respect to business and human rights.

Policy objective 12: State-based non-judicial mechanisms are a source of continuous learning.[10]

12.1 The State makes appropriate use of the expertise of State-based non-judicial mechanisms with regard to the development of regulatory and enforcement policy relevant to the respect by business enterprises for human rights. To this end, the mechanisms are given appropriate opportunities to make recommendations for reforms to institutions, initiatives and operating practices aimed at improving the effectiveness of State-based non-judicial mechanisms, and enhancing their contribution to accountability and remedy in cases of business-related human rights abuses.

12.2 Periodic and/or annual reports by State-based non-judicial mechanisms include, to the extent possible and relevant, information about (a) regulatory or compliance challenges in specific operating or industrial contexts, or on systemic or market-related issues that may be impeding the effectiveness of regulatory strategies or agencies, and (b) legal or policy interventions that may help to address these challenges, together with information about their effectiveness, if available. The State draws from this know-how and the recommendations in developing policies, legislation, regulation and guidance aimed at addressing business-related human rights risks and protecting against business-related human rights abuses.

12.3 The State has made arrangements to allow for the sharing of know-how among State-based non-judicial mechanisms, and between the mechanisms and other regulatory agencies, to the extent appropriate in the light of their mandates and functions, with a view to improving the capacity and effectiveness of all domestic bodies and initiatives that, directly or indirectly, monitor respect by business enterprises for human rights.

Part III. Improving the effectiveness of State-based non-judicial mechanisms in cross-border cases

Policy objective 13: State-based non-judicial mechanisms have access to information, advice and assistance from relevant State agencies in other jurisdictions to the extent and in the manner required for the fulfilment of their mandates and functions.

13.1 The State sets out a clear policy expectation that State-based mechanisms will respond to cross-border cases to the fullest extent permitted in the light of their mandates and functions, and considers making appropriate adjustments to such mandates and functions where this is necessary to respond to business-related human rights risks that are cross-border in nature.

13.2 The State has made arrangements to enable State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to seek assistance from, and to respond to requests for assistance from, State agencies in other jurisdictions for the purposes of (a) gathering information relating to complaints and/or disputes, (b) informing complaint handling and/or dispute resolution processes, (c) adjudicating and resolving complaints and/or disputes, and/or (d) delivering an effective remedial outcome.

[10] A/HRC/17/31, principle 31 (e) and commentary.

13.3 State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, participate in and contribute to the development of initiatives and networks of State agencies and practitioners from different jurisdictions with the aim of (a) improving the ease with which and speed at which requests for information, advice and assistance can be made and addressed; (b) creating opportunities for joint and/or coordinated responses to complaints and/or disputes arising from business involvement in human rights abuses that have, or appear to have, a cross-border element; and (c) promoting peer learning among State agencies about regulatory, complaint handling and dispute resolution best practices.

13.4 The State has made arrangements for State-based non-judicial mechanisms, to the extent appropriate and relevant in the light of their mandates and functions, to be able to call upon their embassies and consular services for assistance with research and information-gathering for the purposes of investigating, adjudicating and resolving claims, complaints or disputes arising from adverse human rights impacts that are business related.

13.5 States work through their embassies and consular services to raise awareness and publicize information about the activities and procedures of relevant State-based non-judicial mechanisms, including information about their mandates and functions in investigating, adjudicating and resolving complaints and/or disputes arising from business involvement in human rights abuses which have, or which appear to have, a cross-border element.

13.6 State-based non-judicial mechanisms have access to the information, support, training and resources necessary to enable personnel to make effective use of the arrangements referred to in paragraphs 13.2, 13.3, 13.4 and 13.5 above.

13.7 The State works through relevant bilateral, regional and multilateral forums and bodies to strengthen methods, systems and domestic law regimes and initiatives relevant to investigating, adjudicating and resolving complaints or disputes arising from business involvement in human rights abuses.